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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC)

Defendant)

PUBLIC
VERSION

Docket No NOR 42107

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REPLY EVIDENCE OF CSX TRANSPORTATION, INC.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant)

**PUBLIC
VERSION**

Docket No NOR 42101

REPLY EVIDENCE OF CSX TRANSPORTATION, INC.

INTRODUCTION

DuPont's Complaint in this case—and in the two companion cases it has filed at NOR 42099 and NOR 42100—is an attempt to disaggregate a single multimillion-dollar commercial dispute into selected, isolated rates to be challenged in multiple individual Three Benchmark cases.¹ There is no apparent objective reason DuPont chose to challenge the rates for these particular movements instead of others. It appears that DuPont may be seeking to use these proceedings to attempt to gain negotiating leverage for its many other movements on CSXT.² DuPont's attempt fails, however, because it is not entitled to relief under the Three Benchmark Approach for multiple reasons.

First, DuPont has utterly failed to carry its burden to demonstrate that CSXT has market dominance over the issue movement. A few months before it filed this litigation, DuPont represented to CSXT in negotiations that DuPont had a competitive truck option for the

¹ See *Piacente V S*, Ex 2, at ¶ 4

² See *id* at 5

movement of nitrobenzene from Pascagoula, MS to Neuse, NC CSXT lowered the rate it offered in response to this viable truck competition This evidence of the parties' actual competitive behavior in the marketplace definitively disproves any claim of market dominance, and the Complaint should be dismissed

Second, DuPont's "initial tender" of a comparison group are less comparable to the issue traffic than the comparison group preferred by CSXT While CSXT developed its comparison group by using criteria that reflect its consideration of the real-world factors that drive pricing for the issue movements, several of the criteria used by DuPont for its excessively narrow initial tender are not defensible DuPont's inferior comparison group consists almost entirely of a single commodity, and it is not the issue movement commodity CSXT's proposed comparison group, by contrast, is based upon movements included in the same CSXT rate tariff Thus, CSXT considers those movements sufficiently similar such that CSXT's real-world, market-based tariff charges the same rate for those movements If the Board does not dismiss this case because DuPont has failed to demonstrate CSXT has market dominance over the issue movement, it should adopt CSXT's comparison group

Third, DuPont's proposal that the Board retroactively adjust its current RSAM calculations for 2002-2005 is entirely unjustified The Board recently decided to apply a new Capital Asset Pricing Methodology ("CAPM") for calculating rail carriers' cost of capital *prospectively* Departing from that practice by recalculating the RSAM in this proceeding poses both severe practical hurdles and serious concerns about the legality and fairness of such retroactive rulemaking Moreover, it would be procedurally improper for the Board to undertake

such a far-reaching revision of its past determinations in this individual "small rate case" adjudication³

I. CSXT IS NOT MARKET DOMINANT OVER THE TRAFFIC AT ISSUE

The Complaint should be dismissed without further consideration because DuPont has not satisfied its burden of demonstrating that CSXT has market dominance over the nitrobenzene traffic at issue, and therefore, the Board lacks jurisdiction over the challenged rate. To the contrary, the evidence demonstrates that there is effective truck competition for the movement at issue [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

DuPont's newly-minted, developed-for-litigation claim that there is no effective truck competition for this movement is at odds with its own real-world, normal course of business statements and conduct, and it does not satisfy DuPont's burden to prove market dominance

The Board's rate jurisdiction is limited to traffic over which CSXT has market dominance 49 U.S.C. § 10707(a) - (b) "[M]arket dominance is a threshold jurisdictional requirement," and as the complainant, DuPont has "the burden of proof to show that there is not effective competition" for transportation of the traffic at issue *Government of the Territory*

³ CSXT reiterates its objection to the Three Benchmark Approach itself and the rules and limitations the Board adopted to govern cases brought under that approach, and CSXT incorporates its prior discussion of its objections herein See CSXT Opening at 7-13

of Guam v Sea-Land Serv, Inc, STB W C C 101, slip op at 6 (Feb 2, 2007), *Garden Spot & N Ltd P'ship & Ind Hi-Rail Corp—Purchase & Operate—Ind R R Co Line Between Newton & Browns, IL*, 1 C C No 31953, 1993 WL 458881, at *1 n 5 (“rate complainant[] [has] *substantial burden of proof* to establish market dominance”) (emphasis added)

The Board’s market dominance analysis contains both quantitative and qualitative components.⁴ Assessing qualitative market dominance requires an examination of “the competitive alternatives available to the shipper, including intramodal [and] intermodal competition.” *Southwest R R Car Parts Co v Missouri Pacific R R Co*, STB Docket No 40073, slip op at 2 (Feb 11, 1998). The Board’s analysis is “based on the specific market involved, and not broad-brush generalities about competitive conditions in unspecified markets

and considers potential, as well as actual, competition in determining whether alternatives exist.” *Id.* at 6. Whether a mode of competition is effective is a question of whether it is feasible—not whether it has been used in the past. *Id.* Instead, the Board’s consideration of whether intermodal competition is effective often depends on its assessment of the parties’ behavior in the market. For example, where record evidence demonstrates that a rail carrier reduced its rates in response to a shipper’s threat to switch to motor carriers, the Board has found that intermodal competition was sufficient to constitute effective competition, and thereby preclude a finding of market dominance. See *FMC Wyoming Corp v Union Pacific RR Co*, STB Docket No 42022, STB Ex Parte No 346 (Sub-No 29A) (May 10, 2000), see also *Consolidated Papers, Inc v Chicago & North Western Trans Co*, Docket No 37626, 71 C C 2d 330, at 16 - 18 (Feb 19, 1991).

⁴ CSXT does not contest that the issue movement’s revenue-to-variable cost (“R/VC”) ratio exceeds the jurisdictional threshold (sometimes mischaracterized as the ratio for quantitative market dominance) set forth in 49 U S C § 10707(d)(1)(A).

In this case, the record plainly demonstrates that there is effective truck competition for CSXT's rail service for the Pascagoula-Neuse movement of nitrobenzene [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Even prior to the 2007 contract renewal negotiations, DuPont consistently recognized truck as a viable and feasible alternative to CSXT's rail service for the issue movement. In contrast to its current made-for-litigation claims, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

truck is a feasible and competitive alternative to CSXT's rail service over the Pascagoula-Neuse movement. Indeed, in light of its past representations, DuPont's newly-minted, irreconcilable claim in this case that there is "a total lack of effective competition from trucks" completely lacks credibility and should be given no weight. *Compare* DuPont Opening at 13 *with* Kuzma V S., Ex 3, at ¶¶ 3-6

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *FMC Wyoming*, *supra* at 16 (holding that intermodal competition is present, and sufficient to constrain the defendant carrier's rates because the threat of truck conversion caused the carrier to reduce its rates), *see also Consolidated Papers*, *supra* at 16-18 (holding that a carrier's offering of volume discounts over the issue movements because of truck competition is evidence that intermodal competition exists), *cf Amstar Corp v Alabama Great Southern R R*, I C C No 38239S, 1987 WL 99849, at *4 (Nov 10, 1987) ("[T]he record does not contain any evidence that the threat of diversion to trucks produced any competitive response, which makes it appear that the threat was a bluff that was called")

Only now—and plainly for the purposes of this rate litigation—has DuPont made an about-face and claimed that truck is not a viable alternative for the nitrobenzene movement at issue. DuPont offers no explanation for its 180-degree reversal from its past representations about the effectiveness of truck competition. That unexplained reversal alone is reason enough to reject its arguments. Even setting that aside, DuPont's arguments fall far short of meeting its burden to prove market dominance. [REDACTED]

[REDACTED] The question before the Board "is whether a particular transportation is economically feasible, not necessarily whether it has been used in the past." *McCarty Farms v Burlington Northern, Inc*, No 37809, 3 I.C.C. 2d 822, at 8-9 (May 22, 1987) (quoting *Salt River Project Agr Imp v United States*, 762 F 2d 1053, 1059 (D C Cir 1985))

DuPont's claim that the cost of shipping by truck is at a minimum [REDACTED]

[REDACTED] DuPont fails entirely to account for the savings from switching to truck transportation that would offset much of the additional costs it claims it would

incur—savings that DuPont itself emphasized to CSXT when the parties were negotiating a new contract. *See FMC Wyoming, supra* at 14-15 (noting that significant costs are associated with whatever method a shipper chooses to use, and that savings using one mode can be used to offset the costs of using another mode). *Kuzma V S*, Ex 3 at ¶¶ 5-6 And DuPont's selective price quotations from truck competitors do not prove market dominance [REDACTED]

[REDACTED] a mere price differential between a truck rate quote and the challenged rail rate, does not establish that the "differential is so high (for this industry and this product) as to render the truck movement an impractical alternative" *Int'l Minerals & Chems Corp v Burlington Northern, Inc*, No, 38084S, at 10 (May 12, 1986) (a price differential of 29% does not mean that truck was not a competitive alternative; instead, the Commission concluded that the burden was on the shipper to demonstrate the anticipated effect the differential would have on its ability to compete) [REDACTED]

[REDACTED] Moreover, that price differential is overstated

⁶ This assumption is even truer, in light of the fact that Sentinel is a wholly-owned subsidiary of DuPont, see http://www2.dupont.com/Our_Company/en_SG/subsidiaries/ (visited Feb 22, 2008) DuPont presumably is likely to receive favorable rates for a large commitment of traffic

because DuPont's evidence made no attempt to account for the cost savings (including labor and rail car cost savings) that it could realize if it switched to truck transportation. Bald assertions that there is a price differential simply are not enough to satisfy DuPont's burden of showing that the price difference renders truck infeasible.

Finally, DuPont's thinly supported argument that trucking is not feasible because nitrobenzene is a hazardous commodity lacks merit, and is flatly contradicted by DuPont's own statements outside the context of this litigation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] M. Davis, *Sentinel Transportation Flourishes*

Under Close DuPont, Conoco Relationship, Bulk Transporter (Apr. 1, 2000),

http://bulktransporter.com/mag/transportation_sentinel_transportation_flourishes/index.html

(visited Feb. 22, 2008). Because DuPont has failed to offer any evidence that demonstrates nitrobenzene cannot safely be shipped by truck, the Board should give little, if any, weight to DuPont's arguments regarding safety.

In short, DuPont has failed to prove that trucking is not a safe and feasible competitive alternative, [REDACTED]

██████████ In these circumstances, the Board should find that CSXT lacks market dominance over the issue traffic, and dismiss DuPont's Complaint for lack of jurisdiction.⁷

II. COMPARISON CRITERIA AND FINAL COMPARISON GROUP

A. Introduction

The keystone of the *Simplified Standards* procedures for Three Benchmark cases is the development of an accurate comparison group for the issue traffic. Under the Three Benchmark approach, the R/VC_{COMP} derived from the comparison group is the Board's "primary evidence of . . . reasonable R/VC levels" for the issue traffic. *Simplified Guidelines* at 17. For this reason, the Board emphasized that selection of an appropriate comparison group would require a careful review of "a variety of factors" that relate to comparability. *Id.* Indeed, if the admittedly "rough and imprecise" (*id.* at 73) Three Benchmark approach is to have any meaning, the Board must carefully select a comparison group that is as analogous to the issue traffic as possible. A rate prescribed from an ill-fitting comparison group is destined to be inaccurate and arbitrary.

⁷ DuPont has failed to substantiate its allegations that CSXT has market dominance over the issue movements. As the party with the burden of proof to establish market dominance, DuPont was required to produce any and all evidence of such market dominance in its case-in-chief, in order to afford CSXT the opportunity to address and respond to that evidence. *See FMC Wyoming, supra* at 103, 172 (new evidence could not be offered on rebuttal because the defendant would not have the opportunity to respond). DuPont presented its case-in-chief on market dominance in its Opening Evidence, and the Board's rules prohibit it from introducing any new evidence subsequently to attempt to meet its threshold burden of proving market dominance. Therefore, any attempts by DuPont to introduce new evidence on reply or rebuttal would be untimely, and should not be considered by the Board. *See Duke Energy Corp. v. CSX Transportation, Inc.*, STB Docket No. 42070, at 4 (Mar. 21, 2003) ("Rebuttal may not be used in [rate] cases as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief"), *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3) (Mar. 9, 2001) ("We remind parties that, in presenting evidence, the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.")

For this reason, CSXT has spent significant time and effort to identify appropriate comparability criteria for each of the issue movements in DuPont's three complaints. This effort has involved extensive consultation with CSXT marketing officers about the relevant markets for the issue movements and the factors that actually drive prices in the market. Through this process, CSXT has identified comparable movements by applying a coherent set of criteria that correspond to the real-world factors that affect pricing for the issue movements. DuPont, by contrast, has not done this—as the discussion below illustrates. Accordingly, the Board should adopt CSXT's comparison groups.

CSXT and DuPont each submitted an "initial tender" of comparable movements with the Opening Evidence filed on February 4, 2008. Based on its experience and knowledge concerning the issue movements and relevant transportation markets, CSXT developed a set of criteria designed to select a meaningful group of movements that are "comparable" to the issue traffic. DuPont, on the other hand, used one particularly limiting parameter that selected a considerably smaller group of movements for "comparison" purposes. Below, CSXT demonstrates DuPont's approach applies an unnecessary factor that fails to account for comparability in the context of rail transportation, and thus improperly excludes movements that are comparable to the issue traffic.

Below, CSXT discusses in more detail the selection criteria applied by the two parties and the resulting differences in their respective comparison groups. CSXT first explains that the parties used some similar initial selection criteria. CSXT observes that due to the make-up of the parties' "initial tender" groups submitted by the parties on opening, and the Board's instruction that parties' "final offer" groups be drawn only from the records included the initial tenders,⁸

⁸ See *Simplified Standards* at 18.

certain of CSXT's criteria are mooted, eliminating otherwise distracting debate about those factors and focusing on the stark and more significant difference between the parties' initial comparison groups. The majority of the differences between the parties' initial comparison groups is attributable to a single factor. DuPont's unduly narrow limitation of its comparison group using a criterion that is not even considered by CSXT in evaluating its markets or pricing its services. See DuPont Opening Evid. at 19 (relying on a "hazardous materials response code" classification used primarily to provide information to emergency responders in the event of a release of a material into the environment). By narrowly defining its comparison group based on an irrelevant factor, DuPont generates an inferior and inadequate comparison group. By contrast, CSXT's groups are "most similar in the aggregate to the issue movements" of nitrobenzene. See *Simplified Standards* at 18.

B. Similar Selection Criteria Applied by Both Parties

CSXT and DuPont applied three initial selection criteria that are essentially the same in developing their nitrobenzene comparison groups. First, the parties each followed the direction of *Simplified Standards* by limiting potentially comparable movements to those generating R/VC ratios greater than 180%.⁹ Second, the parties each limited potentially comparable movements to the same freight broad car type – tank cars – as that used by the issue traffic.¹⁰ Third, both parties limited potentially comparable movements to those moving in private equipment, the type used by the issue traffic in this case.

⁹ While the parties apply this criteria similarly in identifying their comparison groups, this would not be the case if the Board were to accept DuPont's proposal to use the new CAPM model to re-estimate – retroactively – the cost of equity, as this would require recalculation of CAPM-based R/VC ratios for the potentially comparable movements and require a separate determination of which traffic is in the "R/VC>180%" category.

¹⁰ As the Board is well-aware, the differences of freight cars within these broad car types are extensive and significant.

C. Similar Factors Applied Differently by the Parties

In their Opening Evidence, CSXT and DuPont also addressed similar parameters, but applied different approaches, which in turn produced different comparable-movement results for two types of traffic

- (1) Interline Traffic, and
- (2) Issue Traffic

First, because the challenged rates apply to movements handled solely by CSXT, each party excluded from its comparison groups records that do not identify CSXT as the originating and the terminating carrier in the Waybill Sample. *See* CSXT Opening Evid. at 15, DuPont Opening Evid. at 16-17. Review of the verified statement and workpapers of DuPont's consultant Mr. Crowley, indicates that DuPont also excluded Waybill Sample records that identify no carriers other than CSXT, but report a "rebill code" that suggests the traffic may be interchanged with another carrier.¹¹ In order to eliminate confusion and remove any basis for arguing that this factor suggests that DuPont's comparison groups are superior in this respect, CSXT accepts and applies to its final comparison groups DuPont's proposed limitation of potentially comparable movements to traffic that reports a rebill code of zero. *See* DuPont Opening Evid., Crowley V S., at 8.¹²

¹¹ In many instances, this rebilled traffic may identify shipments moving under "Rule 11" accounting, where a carrier provides a rate for a portion of an interline move. In such cases, the revenues in the Waybill Sample would not be subject to the same distortion that results from allocating a portion of through revenues to CSXT, but would reveal actual CSXT revenues for the movement. Because the Board has limited comparison group evidence to Waybill Sample and publicly available data, however, CSXT is prohibited from using non-public information to demonstrate which moves should be included and which should be excluded.

¹² Here, and elsewhere, when CSXT accepts a DuPont position on a selection criterion, it does so for the sole purpose of limiting the disputes between the parties regarding comparison criteria in this specific case. Although CSXT accepts a DuPont approach for that purpose only, such acceptance does not necessarily indicate that, as a general matter, CSXT agrees that use (or non-use) of a particular criterion is appropriate for purposes of identifying comparable movements.

Second, each party sought to exclude issue-traffic movements from its comparison groups. See CSXT Opening Evid. at 18, DuPont Opening Evid., Exhibit (TDC-3), at 1. CSXT determined the records to exclude by reviewing the traffic of the issue commodity moving from the origin to the destination identified in the complaint. See CSXT Opening Evid. at 14. [REDACTED]

[REDACTED] DuPont's criterion failed to identify all of the issue traffic, and thus failed to eliminate from its comparison group 6 issue movement records, which represent *nearly 30%* of its comparable movements. See CSXT workpaper "42101 Reply Analysis.xls."

D. Criteria Applied by CSXT But Not by DuPont

CSXT further refined its potentially comparable movements to include traffic that also met five additional criteria:

- (1) Similar Commodities,
- (2) Fuel Surcharge,
- (3) Domestic,
- (4) Single-Car Shipments, and
- (5) CSXT Single-Line

DuPont applied none of these criteria. The vast majority of the differences between the parties' comparison groups are the result of DuPont's failure to apply the first two criteria. Below, CSXT describes the extremely limited "comparison" group generated by DuPont's over-restrictive screen, which eliminated movements of like commodities, and that group's erroneous inclusion of movements not subject to a fuel surcharge. CSXT then discusses the initial comparison-group differences attributable to the three remaining factors.

1 CSXT's Criteria Select Like Commodities, DuPont's Criteria Do Not

In this case, the most significant selection criterion is the approach by which the parties select comparable commodities. DuPont appropriately limits its comparison group to commodities included in CSXT's public tariff CSXT-28151. However, it also artificially limits its comparison group to a subclass of hazardous materials to which nitrobenzene is assigned ("Class 6, Division 6.1"), and excludes any commodity that is not both covered by CSXT-28151 and within Hazardous Materials Response Code 6.1. See DuPont Opening Evid. at 18. By doing so, DuPont not only effectively limits its comparison group effectively to a single commodity that is not the issue commodity, it excludes other commodities that the parties agree are comparable to the issue traffic. Compare *id.* with CSXT Opening Evid. at 17.

CSXT prices to the market, not based on a hazmat response taxonomy that is wholly unrelated to the commercial marketplace. The Department of Transportation's Hazardous Materials Response Classification ("HMRC") system was promulgated for essentially one purpose – to aid in the response to a release into the environment of a hazardous material. The HMRC classes indicate what danger a released material may pose to humans or to the environment, *e.g.*, whether a material is corrosive, or flammable, or explosive, or poisonous, and so forth. These codes allow fire and rescue personnel and other first responders to identify the nature of the risk posed by a particular release and take appropriate steps to mitigate that risk. These codes exist to identify risks and promote safety and proper response to accidental releases – they have nothing to do with any market or commercial characteristics of the commodities they cover. [REDACTED]

[REDACTED] Rather, CSXT bases its rates, and conducts rate negotiations based on, commercial and marketplace

considerations such as the value of and demand for the commodity, the shipper's competitive transportation options, potential bundling with other movements, and other related business opportunities

Table 1 summarizes the records included in each parties' opening comparison groups by commodity. As noted above, all six of the nitrobenzene moves in DuPont's group are its issue traffic, which should be excluded. When this correction is made to DuPont's comparison group, all but one of the records in its proffered comparison group are movements of a single commodity, phenol. However, DuPont offered no evidence to suggest that, for purposes of transportation rate comparisons, phenol movements are more comparable to movements of nitrobenzene than movements of all other commodities.

Table 1

| <u>STCC</u> | <u>DESCRIPTION</u> | <u>CSXT</u> | <u>DuPont</u> |
|-------------|---------------------------------|-------------|---------------|
| 2815102 | BENZALDEHYDE | 1 | |
| 2815111 | CARBOLIC ACID (PHENOL) | 94 | 14 |
| 2815112 | ANILINE | | 1 |
| 2815119 | CHLOROBENZENE | 1 | |
| 2815121 | CRESYLIC ACID | | |
| 2815141 | MALEIC ACID OR MALEIC ANHYDRIDE | 11 | |
| 2815147 | NITROBENZENE* | | 6 |
| 2815157 | PARADICHLOROBENZENE | 5 | |
| 2815202 | ALKYL SUFONIC ACID | 1 | |
| 2815231 | ISOPROPENYLBENZENE | 6 | |
| 2815260 | TOLUENE DIAMINE | 1 | |
| 2818105 | ACETONE, NEC, SYNTHETIC | 12 | |
| | COMPARISON GROUP TOTAL | 132 | 21 |

*DuPont issue traffic

CSXT, in contrast, limited its comparable movements to those commodities included in "CSXI-28151," a public tariff that covers "Hazmat Cyclic Intermediates," including nitrobenzene. *See CSXT Opening Evid.* at 18. CSXT further explained that these commodities were similar, sharing common transportation characteristics, functions in the manufacturing

cycle, users, and markets *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CSXT's use of commodities that are so similar that they are grouped together in the same tariff in CSXT's normal course of business provides a comparability factor that is far superior to DuPont's artificial, made-for-litigation position that focuses on differences in hazardous materials response classes that are irrelevant to evaluating CSXT's transportation rates

In fact, the parties are *in agreement* that CSXT Tariff 28151 is a particularly good comparison criterion that identifies a group of like commodities. In its Opening Evidence, DuPont discusses the relevance of that tariff, concluding that it "represents strong evidence" regarding similar demand elasticities and is "especially compelling." *See* DuPont Opening Evid. at 20. DuPont also emphasizes the fact that the commodities are priced the same, consistent with CSXT's position that the similar pricing structure is an important comparability factor. DuPont's sole basis for excluding from its comparison group movements of other commodities covered by CSXT-28151 is its specious distinction between HMRC class 6.1 hazardous materials and all other materials. As demonstrated above, this hazardous response classification has nothing whatever to do with transportation market forces, conditions or considerations.

2. DuPont's Failure to Consider Fuel Surcharge

While DuPont's failure to include movements of like commodities renders its comparison group unacceptable, its failure to differentiate between movements that are and are not subject to a fuel surcharge further undermines its proffered groups. CSXT appropriately limited its

comparison group to only those movements for which CSXT applied a fuel surcharge. *See* CSXT Opening Evid. at 16. The challenged rates carry a fuel surcharge. Other moves to which CSXT applies a fuel surcharge are more likely to reflect the same market dynamics as the issue traffic. Traffic to which a fuel surcharge does not apply are likely to be less comparable. CSXT may not have been able to apply a fuel surcharge due to market factors that are not comparable to those of the issue traffic, or in lieu of applying a surcharge it may have negotiated other terms that would not be reflected in the R/VC for that movement. Regardless of the marketplace reason that some movements have fuel surcharges and others do not, it cannot be seriously disputed that *holding other factors constant*, movements with fuel surcharges are more similar to one another than a collection of movements with and without fuel surcharge provisions. CSXT's use of this comparability factor – which is readily identified from the Waybill Sample – further renders its nitrobenzene comparison group superior to DuPont's proffered group.

3 *CSXT Selection Criteria from Opening that No Longer Account for Differences Between the Parties*

In order to reduce comparison factor disputes, and to eliminate confusion and diversion from the most important differences between the parties' selection criteria, CSXT has eliminated differences between the parties related to three selection criteria it used in its Opening Evidence.¹³ First, CSXT's first comparison group excluded shipments that originated or terminated outside the United States, due to the differing laws, regulatory, and reporting requirements, and other challenges in performing reliable comparisons of revenues and costs. *See* CSXT Opening Evid. at 15. As DuPont's overall selection criteria did not result in any

¹³ This is due to one adjustment that CSXT makes to its Reply comparison group, the application of other criteria, and the Board's limitation that the parties draw "final offer" groups from only those moves that were submitted in one of the parties' Opening comparison groups. *Simplified Standards* at 18.

international shipments in its comparison group, and the Board allows the inclusion in “final offer” groups of only those movements that were in at least one of the parties’ initial tenders. there is no longer a dispute between the parties the final comparison group in this case will include only domestic traffic

Second, the parties’ Opening Evidence indicated a difference in selection criteria related to shipment size While CSXT limited its potentially comparable movements to single-car shipments (*i.e.*, less than six carloads) as the issue traffic, DuPont would have included shipments that were waybilled in multiple-car or trainload blocks *Compare* CSXT Opening Evid at 14 *with* DuPont Opening Evid at 18 DuPont’s overall criteria, however, generated a comparison group of only single-car shipments As with the domestic criteria explained in the prior paragraph, there is no longer a dispute between the parties the final comparison group in this case will include only single-car shipments

Third, CSXT also excluded from potentially comparable movements shipments that were originated or terminated by a short-line or switching carrier, as the revenue and cost information reported in the Waybill Sample does not reflect CSXT’s portion of the move ¹⁴ *See* CSXT Opening Evid at 15 While DuPont did not employ such a limitation, its comparison group did not include any such movements Thus, there is no longer a dispute between the parties the final comparison group in this case will include no short-line traffic

E. More Restrictive Criteria Applied by DuPont

One other area where DuPont was more restrictive than CSXT in its Opening Evidence relates to the length of haul Specifically, while CSXT explained that a group of comparable movements could be obtained by excluding that traffic for which length of haul generally has the

¹⁴ CSXT used the Freight Station Accounting Code (“FSAC”) information reported in the Waybill Samples to identify such movements

most effect – movements of distances shorter than 200 miles – DuPont selected only those movements whose length is within a certain distance of the length of the issue traffic’s haul. *Compare* CSXT Opening Evid at 15 with DuPont Opening Evid at 17. In a best offer format, it is important that the parties attempt to narrow their differences where appropriate. Here, CSXT is willing to accept for this case, with some caveats, the DuPont suggested criterion for length of haul. While CSXT is willing to accept a more narrow mileage criterion solely for the purposes of focusing the dispute on the factors contributing significantly to the parties’ differences, it must correct two errors that DuPont committed in performing its mileage selection.

First, DuPont states that while it selected movements for the comparable group whose loaded miles are plus or minus 150 miles of distance traveled by the issue traffic, it did so “rounded to the nearest 50 miles.” *See* DuPont Opening Evid at 17. DuPont explains that this would result in the inclusion of movements between 650 and 950 miles for the issue traffic, which DuPont claims moves 816.7 loaded miles. DuPont has provided no support for this anomalous rounding approach, nor for the unnecessary and distorting proposition that the resulting comparison group should include traffic that travels from 166.7 miles shorter than the issue traffic to 133.3 mile longer, a 25% disparity. In this Reply, CSXT applies DuPont’s factor of plus or minus 150 miles to the issue traffic’s loaded miles, without unnecessary and distorting rounding. *See* CSXT workpaper “42101 Reply Analysis.xls”

Second, DuPont identified its comparison group based on movements that were within 150 miles of the purported loaded miles that it listed in its Amended Complaint. *Compare* DuPont Opening Electronic work paper “HAZ. issue movement miles.pdf” with DuPont Am Compl at 3. CSXT provided with its Answer to the Amended Complaint records of the actual loaded distances traveled by the issue traffic in 2007, and continued to rely upon those mileages

in its Opening Evidence ¹⁵ See CSXT Answer at ¶6 & workpaper “detailed_movement_record_42101.xls” Table 2 summarizes the differences between the parties

Table 2

| Commodity | Origin | Destination | DuPont | CSXT | Diff | % Diff |
|--------------|----------------|-------------|--------|------|------|--------|
| Nitrobenzene | Pascagoula, MS | Neuse, NC | 817 | 829 | 13 | 2% |

For this reply filing, CSXT applies DuPont’s factor of plus or minus 150 miles (without rounding) to the actual loaded miles of the issue traffic movements See CSXT workpaper “42101 Reply Analysis.xls”

F. Summary

CSXT’s selection criteria produce a much superior comparison group to that generated by DuPont’s reliance on a small and excessively narrow group of movements Based on the modifications that CSXT makes to its comparison group in this Reply,¹⁶ the unadjusted R/VC from the Waybill Samples – before consideration of the market changes from the 2002-2005 base period to 2007 – is [REDACTED] The following chart presents the unadjusted R/VCs from each party’s opening evidence, for the records that were common to both parties’ initial tenders,¹⁷ and for CSXT’s final comparison group

¹⁵ DuPont has not offered any evidence in opposition to CSXT’s proof of actual miles

¹⁶ As explained above, CSXT modifies its Opening comparison groups for nitrobenzene to: (1) exclude records coded as rebilled, and (2) include only movements within 150 miles of the issue traffic

¹⁷ *Simplified Standards* provides that any movement that is in both parties’ initial tenders is “required to be included in each side’s final comparison group,” unless there is agreement by the party to exclude it *Simplified Standards* at 18

Chart 1

REDACTED

III. RSAM, ADJUSTMENTS, AND APPLICATION OF BENCHMARKS

A. The Adjustments Proposed by CSXT Are Appropriate and Necessary

As CSXT explained in its opening evidence, in addition to selecting the comparison group movements, at least two further inputs are essential to allow a meaningful analysis of the challenged rates

1 *Updating Historical 2002-2005 Costs and Rates to the Same Year as the
Challenged Rate*

First, cost and rate levels must be updated from 2002-2005 to 2007. Extraordinary growth in demand and unprecedented capacity constraints experienced by the American rail industry in recent years mean that all major railroads, including CSXT, have experienced robust growth in revenues during that period. See CSXT Open at 21-24 & Appendix 5; see also *Piacente V S*, Ex. 2 at ¶ 6-7, 9. CSXT's very substantial growth in revenues and revenue per unit during the watershed period between the early years of this decade and the present mean that prevailing rate levels from 2002-2005 cannot provide meaningful comparators for the challenged rates, which were established in mid-2007.¹⁸ Under these circumstances, use of rates from as long as five years prior to establishment of the challenged rates would present an apples-to-oranges rate comparison and would significantly exacerbate the rate compression flaw inherent in the Three Benchmark approach.

In a time of high demand for, and tight supply of, rail transportation services, economic theory and regulatory policy dictate that prices should go up. Application of outdated historical rates and costs would ignore market reality and artificially depress rail rates through distorting regulatory intervention. This, in turn, would reduce the ability of CSXT to generate the return on

¹⁸ CSXT recognizes that the Board indicated that, as a general matter, it thought that it would not be necessary to update to current levels the costs and revenues from the Waybill Samples provided for use in Three Benchmark cases. See *Simplified Standards* at 84-85. CSXT has made clear its strong disagreement with this conclusion, and this is one of issues it will present in the pending appeal of *Simplified Standards*. See *CSX Transportation, Inc. v. STB*, 07-1369 (D.C. Cir.). However, because of the timing of these cases, the acknowledged effect of the "regulatory lag" is particularly acute. Thus, even under the approach announced by the Board in *Simplified Standards*, the market conditions and circumstances of these cases justify an adjustment to mitigate the effect of that regulatory lag. See *id.* at 85 (recognizing the problem of regulatory lag and indicating that parties could present evidence to show that maximum lawful rate should be adjusted to reflect "market changes not reflected in the comparison group").

investment necessary to justify and allow it to continue to invest in capital improvements designed to relieve capacity constraints and improve service

Adjustment of comparison group costs and revenues is essential to avoid this unwise market distortion and its negative potential ramifications for CSXT and its customers. Accordingly, CSXT has presented evidence demonstrating how both costs and revenues should be updated to current levels. The method CSXT proposes to use to update costs is standard and non-controversial, and is the same method DuPont used to update its estimate of the variable costs of the issue traffic. CSXT has also presented two alternative methods for updating comparison group revenues, one based solely upon public information and the other based in part on current revenue information CSXT produced to DuPont in discovery in this case. See CSXT Opening Evid. at 22-24.

2 Technical Correction to RSAM Calculation

Second, the Board must adjust its RSAM calculations to correct a technical error that results in a failure to account for the effect of income taxes. See CSXT Opening Evid. at 19-21. As CSXT explained in its opening submission, this technical correction is necessary to implement the Board's intent that the RSAM be based upon the amount of revenue a carrier would need to earn in order to recover its annual revenue shortfall (i.e., the amount by which a carrier's actual revenues fall short of revenues necessary to earn "adequate revenues" for the year in question). See Opening Evid., at 20. CSXT presented evidence demonstrating how to make the adjustment to ensure that both the revenue shortfall and the amount of revenue a carrier would need to earn to cover that shortfall are calculated in after-tax dollars. See *id.* at 21. The Board should make this technical correction to effectuate its intent that the RSAM represent the amount a carrier would need to earn to recover its annual revenue shortfall. Compare *Simplified Standards at 19-20 with Rate Guidelines – Non-Coal Proceedings*, STB Ex Parte 347 (Sub-No

2) (Dec 11, 2007), *Simplified Standards at 19-20 with Rate Guidelines – Non-Coal Proceedings*, STB Ex Parte 347 (Sub-No 2) (Dec 20, 2007) ¹⁹

B. DuPont's Proposed Changes to the RSAM Are Unwarranted and Should be Rejected

1 The Board Should Reject DuPont's Proposal to Change the RSAM for 2002 to 2005 Retroactively Based Upon a New, Not Yet Implemented, Methodology for Calculating the "Cost of Capital "

DuPont asks the Board to retroactively change its existing, established RSAM calculations for the years 2002-2005, by applying a new – and, to date, never applied by the Board in any context – “Capital Asset Pricing Methodology” (“CAPM”) methodology for calculating rail carriers’ cost of capital the Board recently announced it would begin to apply *prospectively* the new CAPM approach to estimate rail carriers’ cost of capital for years from 2006 forward *Compare* DuPont Opening Fvid at 24-25 with Decision, STB Ex Parte No 558 (Sub-No 10) (served Jan 17, 2008) (directing rail carriers to develop and submit information and calculate new CAPM cost of equity for 2006) ²⁰ In short, DuPont proposes that the Board

¹⁹ This technical correction to the arithmetical calculation of the RSAM is different in kind from the organic change to the RSAM proposed by DuPont. As discussed below, what DuPont proposes is to substitute a new model for the derivation of the cost of capital to change retroactively the RSAM in a manner not contemplated by *Simplified Standards*. See *infra* III B 1. Whereas the technical correction CSXT has identified would correct an inadvertent error and implement the Board’s intent as described in Ex Parte 646, the wholesale changes DuPont proposes would require the Board to affirmatively change its intended methodology. See *infra* III B -IV. Indeed, the Board expressly considered and rejected one of the two changes DuPont proposes in the *Simplified Standards* proceeding. *Simplified Standards at 19-20 with Rate Guidelines – Non-Coal Proceedings*, STB Ex Parte 347 (Sub-No 2), see *infra* at IV. With respect to the substitution of a new cost of capital model, there is no evidence to suggest the Board was not aware it was using its established DCF model as an essential input to the RSAM figures it issued in December 2007. See *infra* at III B.

²⁰ Even under the expedited schedule adopted by the Board, interested parties’ argument and evidence concerning the calculation of a CAPM-based cost of capital (the first year for which the Board will attempt to use this new methodology) was fully submitted just days ago, on February 29, 2008. Because the parties disagree on how the CAPM approach should be implemented, and thus how the 2006 cost of capital should be calculated, it now appears unlikely that the Board

use these simplified rate reasonableness adjudication proceedings to engage in a wholesale retroactive recalculation of RSAMs from past years. There is no justification to do so, and the Board should reject DuPont's proposal to apply the Board's 2008 CAPM changes retroactively.

In the first place, DuPont's claim that the Board is "legally obligated" to use CAPM to recalculate RSAMs for prior years is plainly wrong. DuPont Opening Evid. at 24. On the contrary, this agency's precedents establish that it generally does *not* retroactively apply such methodology changes. See, e.g., *Edison Elec. Institute v. ICC*, 969 F.2d 1221, 1228 (D.C. Cir. 1992); *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1371 (D.C. Cir. 1988). When the ICC determined in 1989 to begin accounting for productivity in its RCAF calculations, it rejected calls to apply that adjustment retrospectively, finding both that retrospective application could upset "settled expectations," and that data limitations restricted the agency's ability fairly to calculate and apply a retrospective adjustment. *Edison Elec. Institute*, 969 F.2d at 1227. The D.C. Circuit found that the agency's decision not to apply retroactively its changed calculations was reasonable. *Id.* at 1227-28. Similarly, the ICC refused to retroactively apply its newly-adopted procedures to adjust the RCAF to correct forecast errors, reasoning that a retroactive application would unfairly penalize carriers who relied on the previously published RCAF. See *Alabama Power*, 852 F.2d at 1371. As in *Edison Electric Institute*, the D.C. Circuit found this refusal to be reasonable. See *id.* In short, there is clearly no basis for DuPont's claim that the Board is "obligated" to use the new CAPM approach to recalculate previous RSAMs.

will issue a final determination of the 2006 cost of capital before mid-to-late March 2008. Because the parties' final rebuttal submissions in these cases are due April 4, 2008, it would not be possible (let alone desirable) for the Board to obtain input from all interested parties—including numerous entities who are not parties to these adjudicatory proceedings—regarding the appropriate CAPM-based cost of capital for four historical years (2002-2005), resolve methodological and data disputes, establish retroactive new costs of capital for those years, and publish newly RSAM CAPM-based figures in time for the parties to these cases to use them in their evidence.

Indeed, ordinarily agencies may *not* apply new rules retroactively. See *Bowen v Georgetown Univ Hosp*, 488 U S 204, 207 (1988) (“Retroactivity is not favored in the law [A] statutory grant of rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress.”) DuPont’s demand that the Board use CAPM to recalculate past RSAMs is exactly that—a retroactive application of the Board’s January 17, 2008 rule. DuPont would have the Board use its new rule to reopen—in the middle of pending adjudicative proceedings—its previous determinations of RSAM. Such a reexamination would disrupt settled expectations and business conduct and commercial decisions made several years ago in reliance on the Board’s published RSAM figures. Moreover, if the Board were to use CAPM to change its method of calculating the RSAM in Three Benchmark cases, it would have little principled basis not to apply CAPM retroactively to reopen a host of settled decisions, rules and determinations in which cost of capital is a component—including determinations of revenue adequacy, the proposed abandonment of rail lines, and the setting of compensation for trackage rights. See *Railroad Cost of Capital – 2005*, STB Ex Parte 558 (Sub-No 9), at 1 (Sept 15, 2006) (listing some of the proceedings in which cost of capital is a factor)²¹

Properly, the Board has been cautious about upsetting settled expectations by revising cost of capital calculations for prior years. On the same date that it had notified parties of its intent to revise cost of capital methodology, the Board also issued its 2005 cost of capital

²¹ Indeed, if the Board were to use CAPM to reopen RSAM determinations for periods three-to-seven years ago, it would be open to claims that SAC decisions from that period should be re-opened and relitigated based on the new cost-of-capital methodology and its potential affects on *inter alia*, variable costs, R/VC ratios, and whether a defendant carrier should be deemed “revenue adequate.” To be clear, CSXT believes such claims would be inappropriate and rejected. However, re-opening a settled Board determination and benchmark based on retroactive application of a newly adopted (and, to date, not tested by federal court appeal) cost of capital methodology would invite precisely this sort of argument and litigation.

determination, using its established discounted cash flow methodology. *See Railroad Cost of Capital – 2005*, STB Ex Parte 558 (Sub-No 9) (Sept 15, 2006). As the Board subsequently explained to the D C Circuit, it applied a DCF method while considering changes to that method because of “the need for finality” and the importance of having a final cost of capital number for the “many other decisions the Board must make.” *See* Brief of STB and United States at 40, *Western Coal Traffic League v STB*, 07-1064 (D C Cir) (Oct 24, 2007). The need for finality is even more pronounced here, where the question is not whether the Board should postpone issuing a single cost of capital determination during pending rulemaking, but whether it should revisit all of its past decisions involving a cost-of-capital component.²² The Board simply should not make *retroactively* such a complex, fundamental change having such broad implications, including serious potential for upsetting settled expectations and final decisions.

2 *This Individual Case Adjudication is Not the Proper Proceeding to Consider a Far-Reaching Retroactive Change to a Key STB Statistic*

Moreover, this is not the proper proceeding in which to seek retroactive changes to the RSAM methodology. The Board adopted *Simplified Standards*, including the present RSAM methodology as the product of several years of public hearings, multiple proceedings, and extensive notice-and-comment rulemaking in which many interested parties – including all Class I rail carriers and more than one hundred shippers or their representatives – submitted several rounds of comments.

Using this proceeding to change retroactively the RSAM for previous years – an action that affects not only the parties to this proceeding but also all other major rail carriers and rail shippers – would be procedurally improper and unsound as a matter of policy. If DuPont

²² DuPont does not expressly contend that the Board should change its cost of capital determination for years prior to 2002, but this is only because its goal in this case – changing the otherwise applicable maximum reasonable rate – does not require changes to years prior to 2002.

believes that the Board's historical RSAM calculations should be revised in light of the Board's prospective adoption of CAPM, the appropriate step would be to file a petition to reopen those proceedings pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4. Cf. *Western Coal Traffic League v. STB*, 07-1064 (D.C. Cir.) (Feb. 1, 2008) (denying petition for review of 2005 cost of capital decision and holding that appropriate remedy was for petitioner to file petition to reopen that proceeding). To date, neither DuPont nor any other entity has petitioned the Board to reopen any of the Board's prior RSAM calculations. Until such time as a party moves to reopen those proceedings, there is no justification for the Board to even *consider* revisiting them.²³

Even if the Board were to decide – in the proper context of a rulemaking proceeding in which all interested parties could participate – to apply a new cost of capital methodology for some purposes (e.g., in decisions rendered in reopened STB Ex Parte No. 664 and one or more reopened sub-dockets of STB Ex Parte No. 558), the question of whether existing RSAM determinations should be changed by inserting a new cost of capital methodology should only be considered in a reopened *Simplified Standards* (Ex Parte No. 646) proceeding. As DuPont knows very well, a number of shipper groups, including DuPont's own industry association, filed a motion seeking reconsideration of several aspects of the Board's *Simplified Standards* decision, and that motion is pending before the Board. See *Petition for Reconsideration and Suggestion for Expedited Oral Argument of American Chemistry Council et al.*, STB Ex Parte No. 646,

²³ The first relevant request from a shipper for the Board to adopt CAPM on record appears to have been in the comments of the Western Coal Traffic League in Ex Parte No. 558 (Sub-No. 9), which were filed on April 28, 2006. Prior to April 2006 (and certainly in 2002-2005), had no notice or reason to believe there would be a change in the cost of capital methodology that might affect settled regulatory decisions, determinations, and parameters governing their pricing activity and business and commercial decisions. It would be particularly unfair to revise cost of capital calculations for decisions made before any shipper suggested a change to the cost of capital methodology.

Sub-No 1 (filed Oct 12, 2007) ²⁴ Despite this attempted second bite at the *Simplified Standards* apple on behalf of DuPont by its counsel in this case – and despite that Petition’s express request for change to an aspect of calculation of the RSAM for purposes of Three Benchmark cases – the Petition does not request that the Board apply a new cost of capital model to calculate the RSAM prospectively, let alone retroactively *See id*

Moreover, DuPont – which participated in the *Simplified Standards* rulemaking both as a member of a trade association and in its individual capacity – has not sought reopening or reconsideration of the Board’s resulting recalculation of the RSAM in Ex Parte 347 (Sub-No 2) Here again, if DuPont wishes to seek to reopen the Board’s recent recalculation of the RSAM – which it presumably conducted with full knowledge of the then-imminent adoption of a new cost of capital model for prospective application, it should do so in that rulemaking proceeding and afford all interested parties an opportunity to comment *Compare* Decision, STB Ex Parte No 347 (Sub-No 2) (Dec 20, 2007) *with* Decision, STB Ex Parte No 664 (Jan 17, 2008) (Decision adopting new cost of capital model issued less than one month after final Board decision determining RSAM for 2002-2005)

3 *Adjusting the Three-Benchmark Approach to Costs in a Coherent Manner
Would Add Complexity, Cost, and Delay to this “Simplified” Proceeding*

In the context of these specific pending cases, attempting to change the RSAM by retroactively applying CAPM would add complexity, confusion, and potential delay to these “simplified” proceedings First, because the Board has not yet made its first annual cost of

²⁴ Among the dozens of shipper organizations filing the reconsideration petition, the lead petitioner was the “American Chemistry Council,” a chemical industry association of which DuPont is a prominent member *See Petition for Reconsideration and Suggestion for Expedited Oral Argument of American Chemistry Council et al*, STB Ex Parte No 646, Sub-No 1 (filed Oct 12, 2007) DuPont’s counsel in this case is also the primary counsel for petitioners in the pending reconsideration petition *See id*

capital determination using the new methodology, it is impossible to determine at this juncture if DuPont's consultant made his CAPM-based calculations in accordance with the approach the Board will ultimately adopt. Recognizing the potential for divergent interpretations, applications, and implementation of the CAPM model it adopted last month, the Board sought supplemental evidence, and initiated a separate series of public comments for the sole purpose of obtaining interested parties' input and arguments concerning the implementation of that model. See STB Ex Parte No. 558 (Sub-No. 10), *Railroad Cost of Capital – 2006* (served Jan. 17, 2008) (establishing three rounds of comments on the implementation of the CAPM model adopted in STB Ex Parte 646). Given that the Board has not yet decided how it will implement CAPM, there is not yet a standard against which CSXT could evaluate DuPont's proposed application of that model in these cases.

Second, there are several other variables and calculations that would be affected by a change to CAPM, but DuPont's evidence did not make the necessary adjustments. As a result, the changes DuPont advocates would result in an internally inconsistent analysis that would include both CAPM-based costs and DCF-based costs. In order to allow an apples-to-apples analysis, all inputs and variables affected by a change to CAPM would have to be adjusted – any other approach would be logically and analytically incoherent and arbitrary. For example, if CAPM were used to generate a new RSAM figure for use in these proceedings, consistency would require recalculation of all "Return On Investment" variable costs for all comparison group movements. Once those costs are revised for the selected comparison groups, the parties would then need to recalculate the R/VC ratios for all comparison group

movements²⁵ DuPont's failure to recalculate those R/VCs is not surprising – because CAPM-based ROI costs would be significantly lower than their existing DCF-based counterparts, the resulting R/VC ratios for the same comparison groups would be substantially higher. Similarly, DuPont did not recalculate the issue traffic R/VCs to reflect CAPM-based costs, a complex multiple-step process.

Third, DuPont's proposed adoption of the CAPM model for the Three Benchmark approach would require the parties to alter the Waybill Samples the Board provided to the parties for use in these cases, which the Board has prohibited. The *Simplified Standards* Decision expressly provided that proposed comparable movements must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case.” *Simplified Standards* at 18 (emphasis added). In this case, the Board expressly directed that the only evidence that would be admissible for purposes of selecting or advocating for comparable movements would be the Waybill Sample provided by the Board and publicly available evidence. See *E I DuPont de Nemours & Co v CSX Transp. Inc.*, STB Docket Nos. 42099 *et al.*, Decision at 2, 3, 4 (Jan. 15, 2008).

The Board has further directed the parties that they must limit potential comparison traffic to movements that generate an R/VC ratio of greater than 180%. See CSXT Opening Evid. at 15; DuPont Opening Evid. at 14; V.S. Crowley at 8-9 (indicating DuPont identified traffic eligible for inclusion in comparison group by using R/VC > 180% cutoff using a DCF-based cost of equity calculation). *E I DuPont de Nemours & Co v CSX Transp. Inc.*, STB Docket Nos. 42099 *et al.*, Decision at 3 (Jan. 31, 2008) (“the comparison group should be made

²⁵ Because several of DuPont's proposed comparison groups are quite large, its proposed change would require the recalculation of variable costs and R/VCs for thousands of movement records for DuPont's comparison groups alone.

up of 'captive traffic over which the carrier has market power'") The change DuPont proposes, however, would use the CAPM model to revise the Board's Waybill Sample by "recalculating" variable costs for the entire Sample and using the resulting new variable costs to develop a new and different group of movements generating R/VC ratios greater than 180% See V.S. Crowley at 13-14 ²⁶ This "re-costed" Waybill Sample is not the Waybill Sample provided to the parties by the Board at the outset of the case

As the Board further found in *Simplified Standards* changes to Waybill Sample fields should be considered, if at all, only in a separate rulemaking convened to address changes to the Waybill Sample Addressing a proposal to adjust the Waybill Sample revenue field to take account of rebates, the Board stated that if parties "believe there are ways to improve the accuracy and use of the Waybill Sample, they are encouraged to provide their specific recommendations in a petition for a rulemaking, but broad changes to the Waybill Sample fall outside the scope of this rulemaking" *Simplified Standards* at 85 (emphasis added) If changes to Waybill Sample revenue and cost fields were outside the scope of the extensive *Simplified Standards* notice-and-comment rulemaking, they are surely far beyond the scope of a single rate case brought under those rules

Moreover, a logically and analytically coherent CAPM-based approach would require selection of comparable movements from the revised group of traffic (based on CAPM-based

²⁶ This adjustment illustrates the two result-oriented reasons DuPont advocates retroactive application of the CAPM model to change the RSAM figures the Board issued a few weeks before the parties filed their Opening Evidence First, the reduced cost of capital that would be generated by a CAPM model lowers the amount of revenue a revenue inadequate carrier needs to earn in order to attain the annual revenue adequacy level Second, application of the CAPM model to reduce variable costs also would increase the number of movements deemed to generate an $R/VC > 180$, which expands the movements from which the reduced revenue shortfall is to be recovered In combination, those two changes result in a substantially lower $RSAM/RVC > 180$ ratio, which in turn reduces the adjustment to comparison group R/VCs and ultimately results in a significantly lower maximum reasonable R/VC

variable costs) that generate R/VC ratios above 180%. This, however, would require use of data and information the Board has held inadmissible for purposes of selecting comparison groups, data that is neither set forth in the Waybill Sample furnished by the Board nor publicly available.²⁷ Thus, the rules the Board adopted in this very proceeding preclude a principled and coherent application of the new RSAM methodology advocated by DuPont. See *E I DuPont de Nemours & Co v CSX Transp., Inc.*, STB Docket Nos. 42099 *et al.*, Decision at 2, 3, 4 (Jan. 15, 2008).

Fourth, the changes necessary to implement a consistent restructuring of the Three Benchmark approach to apply a new cost of capital model would constitute a prohibited adjustment to URCS costs. As explained above, DuPont's proposal requires re-costing all of the movements in the Waybill Samples, i.e., adjusting those movements' URCS costs. The Board has made clear that it will not allow adjustments to URCS costs in Three Benchmark cases. See *Simplified Standards* at 16 (parties may "use only unadjusted URCS to calculate the variable cost of the issue movement and all movements in the comparison group"), *id.* at 84 ("[W]e conclude that simplified guidelines can only be achieved by adhering strictly to the URCS model to calculate variable costs").²⁸ Thus, the retroactive change advocated by DuPont would require an adjustment to URCS costs, which the Board has flatly prohibited.

²⁷ For example, the Board has issued no CAPM-based cost of equity determinations for any year to date, and certainly not for historical years (such as 2002-2005) for which it previously published DCF-based cost of capital determinations.

²⁸ The Board first decided not to allow URCS cost adjustments in SAC cases in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) Decision (served Oct. 30, 2006). That Decision, which *Simplified Standards* relies upon and incorporates by reference, makes clear that there are only nine "user input" parameters parties may use to calculate URCS costs. *Major Issues* Decision at 52, n. 166. Cost of equity or "cost of capital" is not one of those nine available "user inputs." See *id.*

In sum, DuPont's self-serving proposal is untimely and procedurally improper, would constitute unsound and fundamentally unfair retroactive rulemaking in the context of an individual adjudication, has broad potential ramifications for other matters well beyond this proceeding, would inject considerable complexity, confusion, and potential for delay into a proceeding the Board has designed to be simple, low-cost and efficient, and would violate rules adopted in *Simplified Standards* and in this specific case. For all of the foregoing reasons, the Board should reject DuPont's proposal to apply a new cost of capital model retroactively in this case.

IV. OTHER RELEVANT FACTORS

DuPont suggests that the Board reverse its recent *Simplified Standards* decision and modify the RSAM by applying an "efficiency adjustment" that would reduce maximum reasonable R/VC ratios. The Board has consistently rejected such a modification of the RSAM calculation, and DuPont offers no argument that would justify such an alteration of the Board's approach in the first cases filed under the new *Simplified Standards*. When the Board adopted the *Simplified Rate Guidelines*, it found that modifying the RSAM to eliminate the shortfall attributable to all traffic generating $R/VC < 100\%$ would "understate the revenue requirements that should be borne by captive shippers," and therefore rejected that overbroad modification. *Simplified Rate Guidelines*, 1 S T B 1004, 1029 (1996). The Board further noted that URCS "variable costs" include unattributable joint and common costs, including "fully 50% of road ownership costs, and 70% of total operating expenses."²⁹

²⁹ Even attributable costs overstate the variable costs of any particular movement. A better measure of short run variable costs is directly variable costs, or "DVC." AAR testimony cited by the Board in 1996 demonstrated that "only 2-3% of all rail traffic (accounting for 3% of industry revenues) fails to recover its DVC [Directly Variable Costs]." *Id.* at 1029, n.70. DVC is the measure that is used to approximate short run marginal costs, or "going concern value," a Long Cannon factor. *See id.* at 1027-28.

Second, in one of the few decisions rendered under the *Simplified Rate Guidelines*, the Board flatly rejected the same RSAM modification DuPont proposes in this case – removal from the revenue shortfall determination all movements that generate an R/VC of less than 100% was not “justified by the objectives of a managerial efficiency adjustment.” See *B P Amoco Chemical Company v Norfolk Southern Railway Company*, STB Dkt No 42093, Decision at 9-11 (served June 6, 2005)³⁰ As the Board explained,

In [*Simplified Rate Guidelines*], the Board recognized that an R/VC ratio below 100% does not necessarily reflect improper pricing or a money-losing service. The RSAM benchmark the agency would use was therefore left unresolved [in 1996], but was expected to fall within [a] range [between the unadjusted RSAM and an adjusted figure calculated by removing movements with R/VC < 100%]. The uncertainty created by this range does not appear justified by the objectives of a managerial efficiency adjustment. The amount of revenue shortfall attributed to traffic with an R/VC ratio below 100% cannot provide any reasonable approximation or useful surrogate for other inefficiencies in a carrier's system. And while specific inefficiencies can be brought to light in a SAC analysis under the *Coal Rate Guidelines*, any attempt to measure carrier-specific inefficiencies under the simplified guidelines would add undue cost and complexity to an inquiry that must necessarily sacrifice some precision to achieve simplicity.

Id. at 9-10 (emphasis added)³¹

Finally, in *Simplified Standards*, the Board eliminated the RSAM “range” concept altogether and adopt a single RSAM without any modification for movements generating R/VCs

³⁰ A number of factors unrelated to managerial efficiency account for movements that are recorded as generating R/VC ratios of less than 100 percent. For example, more detailed explanation of the non-efficiency reasons that CSXT moves traffic whose URCS costs appear to generate R/VC ratios of less than 100% is set forth in the Verified Statement of Benton V Fisher, attached as Exhibit 4 hereto.

³¹ The Board further found in *BP Amoco* that rail industry conditions have changed substantially since 1996, such that “there is no longer significant excess capacity in the rail industry.” *Id.* at 10. This eliminated the Board’s primary rationale in 1996 for leaving open the possibility that some efficiency adjustment might be appropriate in some cases. Cf. *Simplified Rate Guidelines*, 1 S T B at 1029.

< 100% *Simplified Standards* at 19 The Board explained that it had proposed to eliminate the RSAM range and use a single “unadjusted” RSAM for the Three Benchmark approach *Id* In three full rounds of comments and a hearing no party to the rulemaking proceeding – including DuPont – opposed the Board’s proposal, and the Board adopted its unopposed proposal

Thus, the Board has made it abundantly clear on multiple occasions that the modification DuPont attempts to resurrect is neither appropriate nor useful, and the Board will not use it in Three Benchmark cases DuPont had ample opportunity to make whatever arguments it wished to make concerning such an adjustment during the Ex Parte No. 646 rulemaking, but it declined to comment Having chosen to remain silent during the rulemaking, DuPont should not be heard to raise this tired, discredited argument for the first time now in specific cases, after the Board has adopted final rules Because DuPont has not proposed – let alone supported – any more refined or precise efficiency adjustment than the blunt and overbroad approach of eliminating all traffic with $R/VC < 100$, it has failed to carry its burden of demonstrating that the Board should consider such an RSAM modification as an “other relevant factor” *See Simplified Standards* at 22 (in order to support adjustment of the maximum reasonable rate to account for alleged carrier inefficiency, shipper must “quantify[] the extent of the inefficiency and how that should affect the presumed maximum lawful rate”) Accordingly, the Board should reject DuPont’s request for an RSAM adjustment

V. THREE BENCHMARK RATE REASONABLENESS RESULTS

Pursuant to the *Simplified Standards*, after determining the average adjusted R/VC for the nitrobenzene comparison group, the next step is to estimate the confidence interval around the mean and to determine the upper boundary for the range of R/VC ratios below which a rate could not be found unreasonable The upper boundary is determined based on the sample size, the standard deviation of the adjusted R/VC ratios, and a statistical measure “t-statistic” that

estimates the 90% confidence interval *See Simplified Guidelines* at 20-22. Table 3 summarizes the results

Table 3

REDACTED

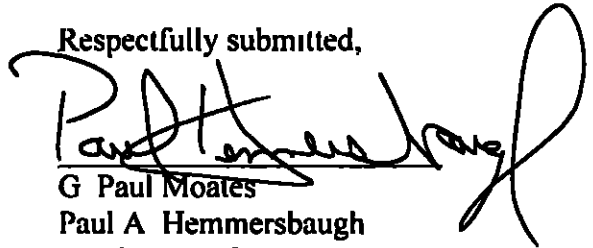
The adjusted R/VC ratios of [REDACTED] for the nitrobenzene comparison group are each higher than the R/VC's for the issue-traffic movement. Therefore, using CSXT's comparison group, the challenged rate is below the maximum reasonable rate and not unreasonable.

CONCLUSION

For all the above reasons, and the reasons in CSXT's Opening Evidence, the Board should find that the challenged rate is not unreasonable

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Dated: March 5, 2008

EXHIBIT 1

Exhibit 1 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

Complainant.)

v)

CSX TRANSPORTATION, INC)

Defendant)

Docket No NOR 42101

**VERIFIED STATEMENT OF DEAN M. PIACENTE
CSX TRANSPORTATION, INC.**

1 My name is Dean M Piacente I am Vice-President - Chemicals and Fertilizer in the CSX Transportation ("CSXT") Marketing Department In my position, I am responsible for the marketing and pricing of CSXT's transportation service for the commodities at issue in the three pending cases before the Surface Transportation Board brought against CSXT by E I DuPont de Nemours and Company ("DuPont") I am providing this verified statement for inclusion in each of those cases The purpose of this verified statement is to describe

a The tremendous changes that have occurred in the markets for rail transportation over the past few years, and to give the Board a sense of how much rail (and, indeed, competing mode) freight rates have risen in that time, and

b The unique nature of chlorine transportation on CSXT

2 My main point, common to all three cases, is that the Board should not decide these cases by relying exclusively upon carload revenues generated by prices that prevailed even a few years ago Such an approach would constitute a faulty method for assessing the reasonableness of our

current rates in all three cases, but most especially in Docket No 42100,¹ involving shipments of chlorine

Part of the difficulty stems from the concept of a "comparable movement." There seems to be a view that "comparable movements" should be understood to mean "data sets" from the carload waybill sample – even if those data sets contain five-year-old data. I do not agree. In my view, a "comparable movement" means a transportation movement that occurred between an origin and a destination pair, which for some set of reasons is regarded as having sufficient similarities with the issue movement such that its current revenue and current costs can be appropriately compared with the current revenue and current costs of the issue movement. At the very least, the revenues and costs applied to the comparison origin-destination pairs should be current market revenues and costs. Otherwise, the Board will be engaged in price-setting based on history – not the market.

3 DuPont is one of CSXT's largest customers, shipping thousands of carloads of a variety of commodities in hundreds of traffic lanes and generating annual freight revenues of approximately [REDACTED]. For many years DuPont moved its traffic on CSXT under an omnibus, privately negotiated transportation contract (the "Master Contract") which covered the several hundred lanes over which DuPont traffic moves. Over the years, DuPont and CSXT renegotiated the terms of that Master Contract several times and amended it as new facilities or movements were added to the scope of the arrangement. The Master Contract was a complex document that covered both hundreds of movements and a variety of other terms and conditions,

[REDACTED]

[REDACTED]

¹ Chlorine is specifically addressed in a latter portion of this statement

4 In the summer of 2006, CSXT and DuPont began discussing a renewal of the Master Contract. The goal of these negotiations was a new contract that would govern the parties' entire commercial relationship. While throughout the course of the negotiations DuPont and CSXT discussed rates for many specific lanes, the focus of the negotiations was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 The traffic covered by this Complaint (and the two companion cases DuPont has filed) therefore is simply a small component of a large dispute between the parties regarding hundreds of lanes of traffic long governed by a complex, integrated Master Contract. There is no apparent reason DuPont has selected these isolated movements to challenge instead of others. It appears, however, that DuPont intends to use the results of these proceedings in an attempt to gain negotiating leverage for its many other movements on CSXT.

6 Over the past several years, a confluence of market factors has driven transportation prices upward by substantially greater percentages than the rate of inflation. While this may have come as a surprise to many customers, who have in many cases enjoyed annual rate reductions (adjusted for inflation) for over a decade, it reflects the natural workings of the marketplace.

7 Every business attempts to maximize its pricing, consistent with optimizing volumes, and I do not suggest that CSXT has ever done anything else. However, what we have found since approximately 2004 is that the marketplace has been changing rapidly, and we have generally

been able to negotiate higher prices with our customers. Broadly generalizing, this has been true across our entire customer base, with different dynamics in the company's different marketing groups – as would be expected given the very different dynamics of the underlying commodities and products markets.

8 Since 2004, overall CSXT revenue per car for all chemicals market traffic (which we define as movements of commodities having two digit STCC header 28 and which contains all the commodities at issue in these three cases) has increased by at least 38 percent. I calculated this percentage increase using CSXT's publicly available Quarterly Commodities Statistics data for the period 2004 through 2007. Chlorine rates have changed even more, [REDACTED] [REDACTED] (Chlorine represents a special case and I discuss it in more detail below)

9 For this reason, simply using an unadjusted revenue figures appearing in the Waybill Sample for movements that occurred in 2004, or even 2005 as the basis for comparison with rates in 2007 and 2008, would be highly misleading. The market has changed radically since 2004-05. Rail capacity is being challenged in many lanes, and we must price additional traffic that customers want CSXT to handle in those lanes accordingly. All-in transportation costs include any applicable fuel surcharge, which has risen as the price of oil has risen. Publicly-available market reports indicate that motor carriers are raising their freight rates as well. Driver shortages, hours of service considerations, equipment shortages, and highway congestion all contribute to upward pressure on motor carrier pricing. Barges also seem to be increasing prices, and are reportedly in an industry-wide recapitalization cycle.

10 Finally, I would like to turn to the special case of chlorine. There are several points that need to be made about this commodity.

- There is a rapidly growing set of legal requirements for special attention and handling for Toxic Inhalation Hazard chemicals
- Chlorine prices on CSXT have risen faster over the past several years than for virtually any other commodity
- CSXT is engaged in a multi-year effort to adjust chlorine rates to (1) discourage unnecessary shipments via CSXT and (2) discourage longer distance shipments via CSXT.
- CSXT would prefer not to transport chlorine, and if given the right to refuse to do so, would handle this commodity only where absolutely necessary for the public health and welfare
- There is no price that CSXT could charge that would economically justify the risk that our company is forced to take moving chlorine. We purchase all the liability insurance that is reasonably available and yet we still subject our company to a risk of ruinous liability should a catastrophic incident occur in a highly populated area. One need look no further than the Norfolk Southern's incident at Graniteville, SC in 2005 to understand how grave an incident can be

11 There is a rapidly growing set of legal requirements for special attention and handling for Toxic Inhalation Hazard chemicals. The Board is doubtless familiar with proposed regulations by DOT and TSA regarding handling of these commodities. DOT's proposed routing analysis and other rules have already imposed substantial, but difficult to quantify, costs on CSXT in the form of management time planning on how to implement the rules if adopted as proposed. Once implemented, CSXT will be required to analyze each movement of chlorine, identifying a route based upon a 27-factor analysis, as well as comparing that route with a best alternative route. As proposed, this would be an annual effort with a recalibration of the process every five years. TSA proposes to prohibit the use of certain interchanges between carriers and to impose new requirements for pick-up and delivery between carrier and consignors and consignees. The changes in routing that the TSA regulations require will clearly add costs to handling chlorine, and in some cases may make handling by rail impossible unless TSA adopts a waiver process.

12 In addition to these rulemaking initiatives, TSA has also issued voluntary action items associated with the movement of chlorine and other TIH materials, and these too, have imposed difficult to quantify costs on CSX. Under the Implementing Recommendations of the 9/11 Commission Act of 2007, more rulemakings – many directly focused on chlorine and other TIH materials will be forthcoming. Over the next five years, the burden of handling chlorine will only grow.

13 None of these burdens and costs are adequately recognized in the unadjusted URCS costs that the Board will apply to the rates at issue in these cases.

14 As I mentioned above, chlorine prices on CSX have risen faster over the past several years than nearly any other commodity, increasing by [REDACTED] since 2004. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] We hope that producers and buyers

will begin to look for alternative products.

15 The transportation characteristics of anhydrous ammonia and chlorine significantly differ even though before are classified as “TIH” commodities. First, rail shipments of anhydrous ammonia are subject to significant truck competition as well as pipeline alternatives. Indeed, CSX faces truck competition for movements of anhydrous ammonia up to 1,000 miles in length. See Ex. 2 (Grammar Logistics Brochure). There is no such competition for chlorine.

movements. Second, anhydrous ammonia is used primarily in agriculture, as a fertilizer or fertilizer component. Chlorine, in contrast, is used in manufacturing processes to create other high value products like medicines, and specialty plastics and materials. There are numerous product substitutes for anhydrous ammonia, but few for chlorine. The presence of these and other competitive and market factors and transportation alternatives simply render shipments of anhydrous ammonia incomparable to shipments of chlorine.

16 We also hope that buyers will look, in the shorter term for closer sources. To encourage that, we are striving to price chlorine and other TIH materials in ways that discourage longer hauls. There is little else that CSXT can do to encourage these kinds of shifts in distribution patterns.

17 Looking back to before 2004, I acknowledge that CSXT took a different outlook. We realized that we had a common carrier obligation to transport these goods, and undertook to price so as to facilitate the distribution of chlorine so that producers on our lines could readily sell their product anywhere in CSXT's service territory without transportation cost becoming an impediment. As a consequence, chlorine manufacturers in Canada had every economic incentive to sell their product to buyers in south Florida, and they did just that. CSXT safely carried those products year after year down the I-95 corridor for over a thousand miles. CSXT is no longer willing to do that. We are attempting to discourage such movements, and hope the Board's decision in this case will not return us to that distribution model.

18 DuPont does not accept this new paradigm. Apparently, from its perspective, it is the duty of the railroad to take DuPont's products – no matter how dangerous or how far – wherever DuPont wants them to go. Furthermore, DuPont apparently believes the price for undertaking that risk should be set artificially low by the government.

19 DuPont recently announced that it would expand a plant in Tennessee to manufacture Titanium Tetra-chloride, another poisonous gas, primarily for use in a new paint manufacturing facility. That new manufacturing facility is to be in Utah. In other words, DuPont, for its own economic benefit, is designing a distribution need that will force a transportation movement of a toxic inhalation hazard over a thousand miles, and through a number of high threat urban areas. CSXT has tried to discourage that plan. We have urged DuPont to build its $TiCl_4$ production capability at the Utah consumption site to minimize the need for TIH transportation. We have advised DuPont that the rates CSXT will quote will be at levels that are substantially higher than those challenged here. We have advised DuPont that given an option CSXT will not accept that traffic. None of this has changed DuPont's decision to design in dependence on a thousand-mile transportation movement.

20 CSXT is engaged in a multi-year effort to adjust chlorine rates to (1) discourage unnecessary shipments via CSXT and (2) discourage longer distance shipments via CSXT. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The outcome of this case will affect the future of those efforts.

21 Some of our customers have been willing to work with us in making changes – at least to reduce unnecessarily long hauls. Even more encouraging, one of our major customers has made it a corporate policy to minimize TIH shipments and has publicly stated that it would like to change its operations and processes so that it does not need to transport chlorine. CSXT has been supportive of those efforts and that is reflected in our pricing. Of course, those pricing

decisions themselves find their way into the Carload Waybill sample, and used against us as "comparable movements "

22 CSXT would prefer not to transport chlorine, and given the right to refuse to do so would handle this commodity only where absolutely necessary for the public health and welfare. It is manifestly unfair to compel a company to engage in an activity it does not wish to undertake when that activity exposes it to ruinous liability, and then undermine its efforts to enhance public safety with its pricing policies by artificially imposing price controls.

23 There is no price that we could charge that would economically justify the risk that our company is forced to take moving chlorine. The burden is more than increased regulation, higher costs, and liability risks. CSXT has been criticized over and over by local government leaders, environmental activists, and the news media for transporting chlorine and other TIH materials through urban centers. Our corporate reputation has been damaged despite the fact that we do not choose to accept these materials, and have no say in where they are shipped from or to. Less than one percent of CSXT's revenues come from moving chlorine, yet a prominent national newspaper has criticized CSXT for allegedly putting its balance sheet before people because it is fulfilling its legal obligation to carry such freight.

24 In deciding whether to impose price reductions on CSXT to facilitate DuPont's distribution network, I ask the Board to take into consideration these other, non-cost factors, as a matter of sound public policy.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify
that I am qualified and authorized to file this testimony

Executed on this 2nd day of March, 2008

Dean M. Piacente
Dean M. Piacente

EXHIBIT 3

Exhibit 3 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 4

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC)

Defendant)

Docket No NOR 42101

**VERIFIED STATEMENT OF BENTON V. FISHER
CSX TRANSPORTATION, INC.**

I. Introduction

My name is Benton V Fisher I am a Senior Managing Director in the Network Industries Strategies group of FTI Consulting My office address is 1101 K Street, N W , Washington, D C , 20005 My qualifications and prior testimony are attached to this verified statement as Exhibit BVF-1

I have been asked by CSXT to respond to portions of DuPont's opening submission in this proceeding and, in particular, the adjustment proposed by DuPont witness Thomas D Crowley to remove from the Board's calculation of the annual RSAM movements that have an R/VC ratio of less than one In this statement, I describe why DuPont's proposed adjustment is inconsistent with the Board's recent decisions, explain that the level of aggregation within URCS and the lack of adequate detail in the Board's Carload Waybill Sample hinder the ability to determine if shipments are moving below directly variable cost, and conclude that there is no basis for applying such an adjustment within the context of the Board's Threc-Benchmark methodology.

II. DuPont's Proposed Efficiency Adjustment to the RSAM is Improper

In an apparent effort to demonstrate that CSX I¹ is inefficient and could reduce its revenue inadequacy, Mr. Crowley recalculates CSX I's 2002-2005 and 4-year average RSAM ratio after elimination of movements that have R/VC ratios less than 1.00. He then recomputes the adjusted RSAM to R/VC_{>1.80} and substitutes the new ratio into the calculation of his "Maximum R/VC Ratio" for each issue movement. This approach raises a host of issues that the STB has addressed many times before, including in the Ex Parte No. 347 (Sub-No. 2), Rate Guidelines – Non-Coal Proceedings decision issued on December 27, 1996, and most recently in the Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases decision issued on September 5, 2007. The STB's findings in these proceedings leave little doubt that the conclusions Mr. Crowley draws from his analysis are faulty.

As a threshold matter, Congress found more than two decades ago that it was unlikely that railroads handled much traffic at rates failing to contribute to going concern value. In fact, Congress found it unlikely that railroads were handling much traffic at rates below those that would maximize the benefit of these traffic movements to the carrier.¹

Furthermore, in the Rate Guidelines - Non-Coal Proceedings decision referenced above, the STB concluded

We agree that URCS variable costs may include a significant portion of what may actually be unattributable joint and common costs. As AAR points out, URCS treats fully 50% of road ownership costs and 70% of total operating expenses on average, as variable (and thus attributable to specific movements). Moreover, AAR has catalogued various waybill and costing limitations that it claims would cause profitable traffic to appear to be unremunerative.

Shippers acknowledge these shortcomings, but argue that, even if not a perfectly accurate measure of cross-subsidization, exclusion of the <100 traffic provides a

¹ Specifically, when enacting the Staggers Rail Act of 1980, Congress concluded that "a carrier has no reason to keep a rate below the most beneficial level, [so that] the conferencees have no reason to believe rates will be held below the most beneficial level except by oversight." Cost Standards for Railroad Rates, 364 U.S. 898, 904. The ICC agreed, noting that "the possibility of harmful predatory pricing under the rules proposed here is *de minimis*, and that the procedural safeguards offered by our protest standards are adequate to guard against such minimal danger as might exist." *Id.*

reasonable surrogate for other inefficiencies in the railroad system. But the shippers offer no support for making a connection or for a bald assertion that the amount of revenue shortfall attributable to the <100 traffic group provides a reasonable approximation of all types of inefficiencies.

Rate Guidelines - Non-Coal Proceedings, IS T B 1028-1029 (footnotes deleted)

The following is a brief description of some of the flaws in DuPont's contention that traffic with R/VC ratios less than 1.00 should be removed from the RSAM calculation.

a. Traffic that Earns More Than Its Directly Variable Costs Contributes To Both Going Concern Value and a Railroad's Joint and Common Fixed Costs.

Traffic contributes to the going concern value of a carrier when the revenues generated by that traffic either maintain or increase the carrier's net cash flow.² The additional amount of revenue earned by the carrier from this traffic helps to cover the railroad's joint and common fixed costs.

To achieve a positive cash flow from a given movement requires only that the revenue generated by that movement exceed the costs that vary directly with the move. In this context, only the incremental costs that would be incurred to provide a specific service should be considered. Thus, the directly variable costs of a traffic movement are those costs which can be attributed to the carriage of that traffic. So long as the incremental revenues from a movement are greater than the incremental costs caused by that movement, the movement contributes to the railroad's going concern value and hence the railroad's joint and common costs.

The Board has recognized that it cannot determine whether traffic contributes to a railroad's going concern value by using the URCS variable cost calculations produced by the general purpose costing system and the Ex Parte No. 399 costing procedures. Instead, the Board has adopted two measures, directly variable costs ("DVC") and the presumptive cost floor ("PCF").³

² 362 I.C.C. 831, Ex Parte No. 355, Cost Standards for Railroad Rates

³ 364 I.C.C. 905, Ex Parte No. 355, Cost Standards for Railroad Rates

The presumptive cost floor is defined by the Board as the sum of the line-haul cost of lading, the applicable switching costs, and station clerical costs. These are the costs that almost always vary with the level of transportation. Directly variable costs are defined as the sum of these three cost categories plus any other costs that vary directly with the movement being examined. By definition, DVC calculations are a function of the particular circumstances associated with individual movements. Thus, they must be calculated on a case-specific basis, using information that is not available from the STB's Waybill Sample. As a result, if one were going to employ a single across-the-board standard to the entire traffic base in order to evaluate contribution to going concern value for a railroad system, the PCF is the only suitable benchmark. In testimony filed in Rate Guidelines - Non-Coal Proceedings, the AAR demonstrated that only 0.3 percent of the nation's railroad traffic moved below the PCF in 1993.

b. The URCS Waybill Sample Costing Process Is the Wrong Tool to Use to Determine Whether an Individual Movement is Making a Contribution to Going Concern Value.

The Uniform Railroad Costing System ("URCS") is the Board's general-purpose regulatory costing formula for the determination of freight railroad movement costs. A dynamic costing tool that incorporates new data as it becomes available annually, URCS estimates the variable costs of rail movements from an intermediate-term perspective. The costing system incorporates annual financial and operating statistics data for each of the Class I railroads for a rolling, five-year period and formulates from these data an econometric relationship between physical "output" and the costs required to produce that output. These cost functions, based on the collective experience of all Class I railroads over time, are used to determine the variability percentages for the individual Class I carriers.

Using these equations and variabilities, system-wide carrier information on one-, three-, and five-year bases is processed to derive the URCS variable costs associated with each unit of output for each railroad. These "unit costs" are then applied against the characteristics of a given

movement to determine the URCS variable cost for that movement. As the Board is aware, the URCS variabilities are based upon cross-sectional analyses of railroad data which effectively measure the medium-run relationship between changes in the level of various expense groupings to large changes in various measures of traffic volume. In evaluating individual pricing decisions, however, the relevant costs are those that vary with marginal or -- at best -- very small changes in traffic volume.

In some industries, this distinction might not be significant. But as the Board recognizes, the railroad industry is characterized by significant economies of scale, scope and density that arise because railroad operating expenses and capital investment are incurred as "step functions" that require significant changes in volume before it is economically rational to adjust the level of expenditure. For example, substantial increases in volume would be required before it would make sense to replace 115 pound rail with 132 pound rail. The existence or non-existence of a particular shipper's traffic -- even a large-volume shipper -- would be unlikely to be sufficient, alone, to change a railroad's plans. Yet this is precisely the relevant issue when evaluating pricing decisions for individual shippers.

Of course, all of the movements that use a particular facility need to cover collectively the cost of that facility, because the facility is an attributable cost of handling these movements as a group. And it is precisely this level of cost that URCS -- by design -- reflects well. But because the URCS variability percentages are derived by examining the effects of large changes in volume, they overstate the costs that are attributable to individual movements -- as the STB recognized in its Rate Guidelines - Non-Coal Proceedings decision. Thus, URCS variable costs are inappropriate for determining whether individual movements cover their long-run marginal cost.⁴

⁴ This is why, of course, the Board previously established the PCF and DVC cost standards -- in an effort to more accurately identify costs that are attributable to individual movements.

In addition to this limitation of URCS, the existence of extensive joint and common costs, the complex variety of services provided by CSXT, the limited information available from the Waybill Sample and the system-wide average cost structure of URCS make the Waybill Sample costing process a poor vehicle for accurately determining a precise movement cost for individual rail shipments. These distortions are especially evident among the traffic with URCS R/VC ratios below one.

If the URCS costs reflected in the Waybill Sample were accurate for this traffic, this data would suggest that CSXT has handled significant volumes of traffic at rates that fail to contribute to going concern value year after year. Not only is this inconsistent with CSXT's experience with its own traffic, it is inconsistent - as noted elsewhere in this discussion - with the conclusions reached by the ICC/STB and Congress. Presented below are specific reasons why the URCS costs reflected in the Costed Waybill Sample overstate the attributable costs of and/or understate the revenues generated by carrying traffic with R/VC ratios below one.

(1) Variable Costs For Non-Class I Carriers

The R/VC ratios for movements in which Class II and Class III carriers participate do not accurately reflect the contribution earned on that traffic. The URCS costing methodology is driven almost exclusively by the expenses associated with operations of the Class I railroads. Therefore, the URCS unit costs that are applied to develop R/VC ratios reflect, in the main, the operating practices of only the largest seven of the more than 500 freight railroads operating in the United States. Movements over non-Class I carriers are not assigned the variable unit costs incurred by those carriers, but rather the variable unit costs associated with Class I railroad operations.⁵

This is important, because many of CSXT's revenues are generated by shipments that occur in conjunction with movements over one or more non-Class I railroads that typically enjoy lower

⁵ Portions of movements over non-Class I railroads are costed using regional default values which are made up almost entirely of Class I variable costs.

variable costs than those exhibited by a Class I carrier. Class II and III carriers often are able to economically operate routes that have proven marginal or unprofitable to the Class I railroads. Their lower cost structures permit the transportation of traffic with relatively lower revenues. Because the higher URCS-based variable costs for Class I railroads are utilized as a surrogate for the lower variable costs incurred by Class II and Class III carriers in the Waybill Sample costing process, the R/VC ratios available from the costed Waybill Sample for movements that involve non-Class I carriers frequently understate the contribution earned on the traffic, thereby deflating the R/VC ratio.

(2) Private Car Costs

The algorithms used to apply URCS variable unit costs to the Waybill Sample movements apply mileage- or time-oriented freight car rental costs. The costing program assumes that no car cost is incurred (car costs "set" to zero) only in the case of coal unit trains comprised of privately-owned cars. But today more than 40 percent of all U.S.-based rail cars are owned by entities other than railroads, and close to 50 percent of all cars on CSXT lines at any given time are private car. Railroads such as CSXT are increasingly setting their rates on non-coal shipments in privately-owned cars on a basis that provides for no freight car allowance payment from the railroad. When this happens, of course, the rate quoted by CSXT is likely to be lower than would otherwise be the case.

It is this lower rate (revenue) that appears on the Waybill Sample, but available data do not permit the Waybill Sample costing process to identify those non-coal shipments transported on the basis of a "no-pay" private car. Accordingly, costs for these shipments are overstated, and the R/VC ratio understates the contribution earned in these instances.

(3) Local Switching (Spotted/Pulled Ratios)

When rail cars are loaded at or near the unloading point of the previous move, carriers may price the loaded movement with the knowledge that there is little or no cost associated with placing

the car at the loading position or for empty repositioning, especially if the car is moving to an off-line destination ⁶ However, the industry switching costs are developed in URCS by multiplying the switches by the spotted/pulled ratios (instead of empty return ratios) In movements of this type, the wrong ratio would be used and would result in allocating to the shipment a switch move that did not occur Thus, the URCS variable costs of the movement are overstated.

(4) Empty Return Assignment

The URCS variable cost assumptions assign to backhaul movements -- and the preceding loaded movement -- an empty return ratio that incorrectly assumes costs would be incurred for a subsequent empty return for the type of equipment being used. Because the inbound loaded, reload, and backhaul movements are achieving higher-than-average utilization of the rolling stock, the costs assigned by URCS are higher than those actually incurred, and the resulting R/VC ratios are lower than those actually attributable to the traffic

(5) Backhaul Pricing

To obtain more efficient utilization of equipment in instances where a car would otherwise move empty (such as a "foreign" car returning empty to its "home" road), CSXT may price a load for this car at a level in excess of the incremental cost attributable to this tonnage, but below the full URCS variable cost The cost of returning this car empty to the owning road is essentially "sunk" and, therefore, the attributable cost actually incurred is substantially lower than URCS variable cost Any revenue generated in excess of this amount would assist CSXT in covering its fixed and common costs.

The fact that this type of innovative pricing is being utilized cannot be determined from any of the fields in the Waybill Sample data base, nor is it possible to match the backhaul movement

⁶ CSXT prices to the market -- not to cost This consideration would not affect the competitive price, but might enable CSXT to meet the competition with the assurance that it was not pricing below its relevant costs

with its corresponding loaded movement. Therefore, the URCS variable costs assigned to such a movement overstate the costs actually incurred by CSXT.

(6) Surplus Equipment

Fluctuations in economic conditions can cause a short-term surplus of a particular type of rail freight car. When this happens, the ownership costs of this surplus equipment are still incurred by the owner. In an effort to defray at least some of the cost of owning a fleet of cars which would be incurred even if the cars sit idle, CSXT may agree to lower-than-"normal" transportation rates in order to generate traffic that will utilize the equipment and make some contribution to the related ownership costs. These rates might well be below the URCS variable cost level for such a movement.

(7) Repositioning

CSXT participates in movements of rail cars that, while empty of cargo, contain shipping devices (various fixtures and appurtenances including, among other things, blocking, cradles, racks, skids, pallets, bolsters, etc.) needed for the shipment of a variety of kinds of freight. These cars must be returned to a point of loading so that this equipment can be utilized in a subsequent loaded movement. In some cases, the shipping devices used in many cars will be consolidated into a single rail car for the return move.

Data from the costed Waybill Sample for these return movements may suggest that the rate being charged is non-compensatory, but the relatively low revenue associated with these repositioning moves is misleading. These moves are only part of an overall profitable package of movements assembled by the railroad marketing departments that include related, but separately-waybilled, "front haul" loaded movements. Only when these movements are linked together can the true overall contribution (and, therefore, the "correct" R/VC ratio) of the bundle of movements be known. But because these movements are waybilled individually, the corresponding loaded and

return movements cannot be matched on the Waybill Sample. As a result, the return movements often are incorrectly identified as non-compensatory.

(8) Inter-terminal and Intra-terminal Moves

Where inter-terminal and intra-terminal movements appear in the Waybill Sample, they are costed, incorrectly, as if they are short line-haul moves. This overstates the costs actually attributable to these moves (which are normal yard re-positionings) and incorrectly identifies them on the costed Waybill Sample as non-compensatory.

(9) Rebilling

For a number of reasons CSXT may use the "Rule 11" accounting provision under which carriers participating in a joint rail movement separately bill their charges for the movement. In the Waybill Sample, "rebilled" shipments appear as a second movement that originates and/or terminates at the rebilling location even though the move is simply interchanged at that point.⁷ The Waybill Sample costing process assigns an origination and/or termination switch cost, instead of the lower cost associated with the actual interchange between the roads, which overstates the URCS/Waybill Sample variable cost for these movements.

(10) Operating Modifications

Since the enactment of the Staggers Act in 1980, the railroad industry has significantly rationalized its plant and staffing. Between 1980 and 2006, Class I railroads reduced employment by 63 percent and miles of road by 42 percent.⁸ CSXT has also achieved substantial improvements in productivity. Productivity improvement of this magnitude results in a major restructuring of the operating patterns and practices of individual carriers. These changes are decidedly beneficial to the railroad and the majority of its shippers, but some dislocations may occur -- for example, the

⁷ In fact, because the Waybill Sample does not include 100 percent of all movements, all of the segments that comprise a single Rule 11 movement may not be included in the Waybill Sample.

⁸ Much of the route mileage was sold to non-Class I carriers, rather than abandoned.

closing of a route or the consolidation of a train yard -- that can cause the variable costs for certain shippers to increase. Under these circumstances, a carrier may elect to increase the existing rate gradually, but while this transition takes place, the costed Waybill Sample may indicate a low R/VC ratio for these movements.

(11) Special Conditions

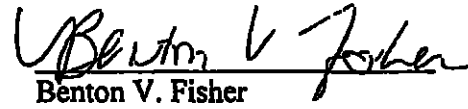
The area in which the URCS-based costing of the Waybill Sample is least effective relates to specific incentive pricing situations. In addition to the items enumerated above, the Waybill Sample and URCS are ill-equipped to detect and establish the proper costs for marketing techniques such as short-term incentive rates (to fill the capacity of a regularly-scheduled but underutilized train, for instance). The actual attributable costs of such traffic are lower than the variable costs assigned by URCS, and their revenues do generate contribution for the railroads.

c. Summary

Given all of the above, the contribution to the revenue needs of the railroads generated by the traffic that is above the presumptive cost floor but below 100 percent of URCS variable costs should not be ignored by the Board. The Board has dealt with this issue before and determined that, if there is a need to ascertain -- on an across-the-board basis -- whether individual movements can be presumed to generate revenues below their attributable costs, the PCF should be used. Obviously, CSXT has determined that this traffic does cover its attributable costs, and carrying it is therefore efficient and reduces the contribution required from captive traffic, including DuPont's issue traffic. DuPont's proposed adjustment should be rejected.

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on March 4, 2008


Benton V. Fisher

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Benton V. Fisher is a Senior Managing Director of FTI's Economic Consulting group, located in Washington, D C. Mr Fisher has more than 15 years of experience in providing financial, economic and analytical consulting services to corporate clients dealing with transportation, telecommunications, and postal subjects.

Mr Fisher has sponsored expert testimony in rate reasonableness proceedings before the Surface Transportation Board.

Mr Fisher graduated from Princeton University with a Bachelor of Science degree in Engineering and Management Systems.

Surface Transportation Board

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| January 15, 1999 | Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher |
| March 31, 1999 | Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher |
| April 30, 1999 | Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher |
| July 15, 1999 | Docket No. 42038 Minnesota Power, Inc. v Duluth, Missabe and Iron Range Railway Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher |
| August 30, 1999 | Docket No. 42038 Minnesota Power, Inc. v Duluth, Missabe and Iron Range Railway Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher |
| September 28, 1999 | Docket No. 42038 Minnesota Power, Inc. v Duluth, Missabe and Iron Range Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher |
| June 15, 2000 | Docket No. 42051 Wisconsin Power and Light Company v Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher |
| August 14, 2000 | Docket No. 42051 Wisconsin Power and Light Company v Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher |
| September 28, 2000 | Docket No. 42051 Wisconsin Power and Light Company v Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and |

Benton V Fisher

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| December 14, 2000 | Docket No 42054 PPL Montana, LLC v The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Christopher D Kent and Benton V Fisher |
| March 13, 2001 | Docket No 42054 PPL Montana, LLC v The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Chnstopher D Kent and Benton V Fisher |
| May 7, 2001 | Docket No 42054 PPL Montana, LLC v The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Chnstopher D Kent and Benton V Fisher |
| October 15, 2001 | Docket No 42056 Texas Municipal Power Agency v The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Benton V Fisher |
| January 15, 2002 | Docket No 42056 Texas Municipal Power Agency v The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Benton V Fisher |
| February 25, 2002 | Docket No 42056 Texas Municipal Power Agency v The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Benton V Fisher |
| May 24, 2002 | Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company |
| June 10, 2002 | Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company |
| July 19, 2002 | Northern States Power Company Minnesota v Union Pacific Railroad Company, Union Pacific's Opening Evidence |
| September 30, 2002 | Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company |
| October 4, 2002 | Northern States Power Company Minnesota v Union Pacific Railroad Company, Union Pacific's Reply Evidence |
| October 11, 2002 | Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company |
| November 1, 2002 | Northern States Power Company Minnesota v Union Pacific Railroad Company, Union Pacific's Rebuttal Evidence |
| November 19, 2002 | Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company |

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| November 27, 2002 | Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company |
| January 10, 2003 | Docket No 42057 Public Service Company of Colorado D/B/A Xcel Energy v The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company |
| February 7, 2003 | Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Opening Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad |
| April 4, 2003 | Docket No 42057 Public Service Company of Colorado D/B/A Xcel Energy v The Burlington Northern and Santa Fe Railway Company, Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company |
| May 19, 2003 | Docket No 42057 Public Service Company of Colorado D/B/A Xcel Energy v The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence and Argument of The Burlington Northern and Santa Fe Railway Company |
| May 27, 2003 | Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Reply Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad |
| May 27, 2003 | Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Reply Evidence of The Burlington Northern and Santa Fe Railway Company |
| June 13, 2003 | Docket No 42071 Otter Tail Power Company v The Burlington Northern and Santa Fe Railway Company, Opening Evidence of The Burlington Northern and Santa Fe Railway Company |
| July 3, 2003 | Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad |
| October 8, 2003 | Docket No 42071 Otter Tail Power Company v The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company |
| October 24, 2003 | Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company Supplemental Evidence of Norfolk Southern Railway Company |
| October 31, 2003 | Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Duke Energy Company's Supplemental Evidence |



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| November 24, 2003 | Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Supplemental Evidence of Norfolk Southern Railway Company |
| December 2, 2003 | Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Carolina Power & Light Company's Supplemental Evidence |
| January 26, 2004 | Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Joint Supplemental Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company |
| March 1, 2004 | Docket No 41191 (Sub-No 1) AEP Texas North Company v The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company |
| March 22, 2004 | Docket No 42071 Otter Tail Power Company v The Burlington Northern and Santa Fe Railway Company, Supplemental Reply Evidence of The Burlington Northern and Santa Fe Railway Company |
| May 24, 2004 | Docket No 41191 (Sub-No 1) AEP Texas North Company v The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company |
| March 1, 2005 | Docket No 42071 Otter Tail Power Company v BNSF Railway Company, Supplemental Evidence of BNSF Railway Company |
| April 4, 2005 | Docket No 42071 Otter Tail Power Company v BNSF Railway Company, Reply of BNSF Railway Company to Supplemental Evidence |
| April 19, 2005 | Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Opening Evidence of BNSF Railway Company |
| July 20, 2005 | Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Reply Evidence of BNSF Railway Company |
| September 30, 2005 | Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Rebuttal Evidence of BNSF Railway Company |
| October 20, 2005 | Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Surrebuttal Evidence of BNSF Railway Company May 1, 2006 Docket No Ex Parte 657 (Sub-No 1) Major Issues in Rail Rate Cases, Verified Statement Supporting Comments of BNSF Railway Company |
| June 15, 2006 | Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company |

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| June 15, 2006 | Docket No 41191 (Sub-No 1) AEP Texas North Company v BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company |
| March 19, 2007 | Docket No 41191 (Sub-No 1) AEP Texas North Company v BNSF Railway Company, Reply Third Supplemental Evidence of BNSF Railway Company |
| March 26, 2007 | Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Reply Second Supplemental Evidence of BNSF Railway Company |
| July 30, 2007 | Docket No 42095 Kansas City Power & Light v Union Pacific Railroad Company, Union Pacific's Opening Evidence |
| August 20, 2007 | Docket No 42095 Kansas City Power & Light v Union Pacific Railroad Company, Union Pacific's Reply Evidence |
| February 4, 2008 | Docket No 42099 E I DuPont De Nemours v CSX Transportation, CSX's Opening Evidence |
| February 4, 2008 | Docket No 42100 E I DuPont De Nemours v CSX Transportation, CSX's Opening Evidence |
| February 4, 2008 | Docket No 42101 E I DuPont De Nemours v CSX Transportation, CSX's Opening Evidence |

EXHIBIT 5

Exhibit 5 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 6

Exhibit 6 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 7

Exhibit 7 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 8

Exhibit 8 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 9

Exhibit 9 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 10

STB Docket No. NOR 42101

E.I. du Pont de Nemours and Company v. CSX Transportation

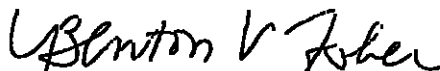
Verification of Benton V. Fisher

I am Benton V. Fisher. I am the same Benton V. Fisher who sponsored portions of CSXT's Opening Evidence in this proceeding, filed February 4, 2008. My statement of qualifications was included as Appendix 4 to that evidence.

I am sponsoring portions of the testimony presented in Sections II and IV.B of the foregoing Reply Evidence of CSX Transportation, Inc. I have read the testimony set forth in those sections, and the statements contained therein are true and correct to the best of his knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

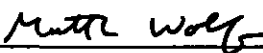
Executed on March 4, 2008


Benton V. Fisher

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of March, 2008, I served a copy of the foregoing by
courier and by first class mail, postage prepaid on the following

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Matthew Wolfe